



April 25, 2011

SENT VIA EMAIL

Office of the State Superintendent of Education
Attn: Elizabeth Morse
801 First Street, NE 5th Floor
Washington, D.C. 20002

**Re: Joint Comments of Class Counsel in Petties v. D.C. and University
Legal Services – Protection and Advocacy re: Notice of Second
Proposed Rulemaking, DCMR, Chapter 28, 5-A**

To Whom It May Concern:

As class counsel for the plaintiff class of students in Petties v. District of Columbia, we appreciate this opportunity to comment on the Proposed Rulemaking Action issued on March 25, 2011 to establish rate-setting for non-public schools. We note that these regulations were proposed pursuant to the “Placement of Students with Disabilities in Nonpublic Schools Amendment Act,” D.C. Code §§ 38-2561.01-.16 (2011). We believe that these rules reflect the Office of the State Superintendent of Education’s (“OSSE”) efforts to establish a stable relationship with non-public providers, and we appreciate and support those efforts. However, we have substantive concerns regarding the proposed rate-setting process and the compliance of the proposed regulations with the Petties court orders.

These comments are a preliminary statement only, as class counsel is still awaiting relevant information regarding the rate-setting process. Class counsel filed a Motion to Compel Discovery in the Interdynamics’ payment dispute on March 31, 2011, and a Motion to Compel Defendants to Produce Requested Information on April 22, 2011 with regard to these regulations. Additionally, Plaintiffs submitted a FOIA request to OSSE on March 17, 2011 and renewed the request on April 6, 2011. Plaintiffs have received only a minimal response –

November 1, 2010 rate letters sent to non-public schools for the 2010 – 2011 school year.¹

Preliminarily, we note that our role in monitoring the rate setting process is an integral part of the Petties case. Judge Friedman has expressly held that rate setting is a critical component of the payment process and has rejected the District's claim that rate setting was not covered by Petties. As the Court stated, "... the development of a rate-setting mechanism is essential to ensure that members of the class not find their special education placements and related services jeopardized as a result of defendants' historically faulty payment practices. It therefore is essential to plaintiffs' class counsel's monitoring role." Order at 9-10, October 20, 2009 (Doc. 1694).

I. The Proposed Regulations Violate the Petties Payment Order.

On August 5, 2009 Judge Friedman issued an Order Regarding Payment for Services to Class Members in Petties v. District of Columbia, (Doc. 1676), setting forth the terms and conditions for payment of special education placements and services for class members. The proposed regulations must comply with the provisions of that Order. We object to certain proposed regulations that violate the Payment Order. Other proposed regulations are inconsistent with the Order, but would improve the payment process and therefore we would agree to those other provisions if the Order is amended accordingly.

A) All enumerated bases for payment in the Payment Order, including settlement agreements, must be listed.

Section 2833 of Certificates of Approval for Nonpublic Special Education Schools and Program Serving Students with Disabilities Funded by the District of Columbia and Special Education Rates (proposed Mar. 25, 2011)(to be codified at D.C. Mun. Regs. titl. 5-A §§ 2800 - 2899) delineates requirements for the content and scope of invoices submitted by nonpublic schools to OSSE, and in doing so excludes settlement agreements from the list of documents deemed acceptable as an authorization of service. Specifically, § 2833.2 provides that:

Payments by OSSE of invoices shall be limited to the services specified and authorized by an IEP, HOD, or court order resulting from the IDEA due

¹ Class counsel also reviewed the American Institute for Research brief report dated March 17, 2011, and OSSE's Nonpublic Rate-Setting Overview, dated March 25, 2011.

process hearing. Multi-Disciplinary Team (MDT) meeting notes, IEP meeting notes, or notes taken in any other type of meeting will be not be accepted as authorization for services.

OSSE's list of acceptable bases for payment excludes several sources listed in the Payment Order that should be included in the final regulations. By its terms, the Payment Order applies to non-public schools and providers that serve class members pursuant to a "court order, administrative decision, notice of placement, IEP, or by agreement with DCPS or OSSE." See Order Regarding Payment for Services to Class Members at 1, August 5, 2009 (Doc. 1676). Furthermore, the Payment Order clearly lists settlement agreements as a permissible and enforceable basis for payment; "If defendant's dispute is based upon a cost sheet, IEP, hearing officer decision ("HOD"), Court Order, settlement agreement, policy and/or administrative documentation..." Id. at 7. We recommend adding "settlement agreements" to OSSE's list of acceptable bases for payment.

Similarly, proposed regulation § 2833.12 excludes settlement agreements. Under that regulation a nonpublic provider cannot invoice OSSE for non-educational costs unless specified in a student's IEP or an HOD or court order resulting from a due process hearing under IDEA.

Excluding settlement agreements violates existing case law. "A settlement agreement is as enforceable as a hearing officer decision, and a school district must abide by it regardless of whether the placement has met statewide educational standards." Saleh v. District of Columbia, 660 F. Supp. 212, 214-215 (D.D.C. 1987).

In summary, the regulations should be amended to include all of the enumerated bases listed in the Payment Order, "cost sheet, IEP, hearing officer decision ("HOD"), Court Order, settlement agreement, policy and/or administrative documentation."

B) We recommend striking § 2833.3(b).

Section 2833.3(b) requires an invoice to include the name of the D.C. agency responsible for placing the student at the non-public special education school or program. This requirement is inconsistent with the terms of the IDEA, its implementing regulations, and the Petties Order, December 5, 2006 (Doc. 1397). Under federal law, the SEA is ultimately responsible for ensuring children with disabilities in its jurisdiction receive a free and appropriate education. 20

U.S.C. § 1412(a)(11)(2005). Furthermore, while an LEA can later claim reimbursement if a public agency fails to pay for special education and related services, the LEA shall provide or pay for the appropriate services in the first instance. 20 U.S.C. § 1412(a)(12)(B)(ii). The proposed regulation is also problematic because a private provider may not know which other agency is responsible for reimbursing the LEA for part or all of a placement or service.

We would not object to a provision asking providers to provide whatever information they have regarding whether another government agency may be financially responsible for the services to the student, and in fact we agree that it would be helpful for most students if the schools, the LEA, and OSSE are fully informed about other agencies that are involved with the student. However, payment of the invoice should not be dependent upon provision of this information.

The Report and Recommendation of the Special Master in the Just-A-Mite Invoice Dispute Hearing Held on October 3, 2006, November 7, 2006 (Doc. 1389-2)² makes clear that the Petties Court intended that it is ultimately DCPS's responsibility to pay providers. In this dispute, DCPS contended that it was not liable for payment to the provider, Just-A-Mite ("JAM") because JAM did not provide documentation expressly ordering DCPS to pay for wrap-around services. According to DCPS, the students ordered to receive the services in question were in the care and custody of Children and Family Services Agency ("CFSA") for abuse, neglect and other "non-education related" issues. The Special Master found under Petties v. District of Columbia, 894 F. Supp. 465 (D.D.C. 1995), the Payment Order, and a Memorandum of Understanding ("MOU") between DCPS and CFSA that DCPS was responsible for payment even absent an express order directing DCPS to pay for the services.

First, the Special Master noted that under the Payment Order, there are "other means of triggering DCPS's liability, other than court orders...the services embraced by the Order are those directed not only by court orders, but also by administrative decisions, notices of placement, IEPs, or specific agreements." Report and Recommendation at 6. The Special Master went on to quote Petties, 894 F. Supp. 465, to support its finding that DCPS is statutorily obligated under the IDEA to ensure that all students receive services according to IDEA requirements. "The District Court's conclusions in Petties are based upon and consistent with DCPS's obligations as the State Educational Association ("SEA") under the IDEA.

² The Petties Court approved the Special Master's Report. See Order, November 7, 2006 (Doc. 1389-2).

Under that Act, the SEA is ultimately responsible for ensuring that all District children with disabilities receive a free and appropriate public education.” Report and Recommendation at 7(referring to 20 U.S.C. § 1412(a)(11); Petties 894 F. Supp. at 466).

C) The following provisions should be incorporated into the Payment Order or the regulations to ensure that the regulations and the Payment Order track each other:

- Section 2833.3 specifies what information should be included for each student on an invoice. The regulations add to the list of required items in the Payment Order at 4.
- Both the Payment Order and § 2833.3(h) require the student’s dates of attendance. The regulations add that the report must identify whether the absences were excused or unexcused. Any non-specified absences will be presumed unexcused. We do not object to this addition.
- Under § 2833.5, a provider must obtain a “written rate confirmation from OSSE” before submitting an invoice. In order to comply with federal regulations and case law, the regulation must contain an exception for instances in which a rate is otherwise specified in an HOD, court order or agreement, or if there has been a delay by OSSE in issuing a rate. See Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993) (affirming a court’s authority to grant appropriate relief once it holds that a public placement has violated IDEA); 20 U.S.C. § 1412(a)(10)(ii) (including payment of the cost of a non-public placement that has not been approved by the State.).
- Section 2833.6 prohibits providers from submitting an invoice based on a bundled rate, unless OSSE accepted the per diem rate from another state or the bundling of related services within the rate submitted to OSSE is permitted or required by that state or political subdivision. The Payment Order also requires itemization of services in the invoice, without providing for the regulation’s proposed exceptions. Payment Order at 4. We do not object to the exceptions, however they should be added to the Payment Order.

- Under § 2833.8, OSSE shall not accept invoices submitted more than six months after the date the services were provided, unless the payments were mandated by an HOD or court order resulting from a due process hearing under IDEA. We would not object to adding this provision to the Payment Order if the following *additional language is included to allow for exceptions: “unless there are unusual or extenuating circumstances.”*
- Section 2833.10 states that a subcontractor cannot bill OSSE directly. The nonpublic special education school or program must incorporate any legitimate costs in its invoice in accordance with approved rates and applicable invoicing requirements. We do not object to adding this provision as long as it is also added to the Payment Order.

II. The proposed regulations should be amended to clarify that a hearing officer can order the District to pay a tuition that is higher than the uniform rate.

Under the current regulations, a nonpublic school without a certificate of approval that accepts a placement of a D.C. student by a due process hearing officer or under a court of law has ninety days to apply for a Certificate of Approval (“COA”). D.C. Mun Regs., tit. 5-A § 2800.5 (2011).

To meet the requirements of the IDEA, the regulation should be amended to allow an exception for parental unilateral placements. In Florence County, 510 U.S. at 15-16 the Supreme Court held that a court may order reimbursement for parents who withdrew their child from a public school that did not provide an appropriate education under the IDEA and placed the child in a private school that was in substantial but not complete compliance with state regulations.

We propose adding the following language to § 2845 titled Rates – General: “if an HOD or Court finds that a parent appropriately placed a child in a nonpublic school, OSSE will pay that school’s tuition rate.” This would also provide an exception to the current regulation, § 2800.5, to prevent jeopardizing HOD or court ordered placements.

III. Section 2852.4(a) should be omitted.

Class counsel objects to the proposed regulation § 2852.4 which states:

Except as provided for below, OSSE shall not pay a nonpublic school or provider for services that do not qualify as related services under IDEA including, but not limited to, tutoring services, extended-day programming and wraparound services.

- (a) Where an HOD or court order resulting from a due process proceeding orders the provision of services described in this section, the nonpublic school or program must obtain written authorizations from the responsible LEA to provide the services and to invoice the LEA directly.

Under subsection 2852.4(a), if a provider sought to confirm payment before providing court ordered services, the provider would have to obtain written authorization from the LEA and invoice the LEA directly. Such a process violates the IDEA. If a hearing officer orders related services for a child, it is an unnecessary and illegal step for the nonpublic school to have to resubmit for subsequent approval by the LEA. If the LEA or OSSE believes the HOD or Court incorrectly ordered those services, then the proper remedy is to appeal using the due process procedures of the IDEA. See 20 U.S.C. § 1415.

Furthermore, tutoring, extended day programming, and wrap-around services are all potential specialized instruction or related services and acceptable listed services in a valid IEP. The IDEA defines related services as:

(T)ransportation and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services, designed to enable a child with a disability to receive a free public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(26)(A).

The Petties Court has clearly held that tutoring, extended-day programming, and wraparound services are all services that may fall under the rubric of

“supportive services” if “required to assist a child with a disability to benefit from special education.” See The Report and Recommendation of the Special Master in the Just-A-Mite Invoice Dispute Hearing Held on October 3, 2006 at 9, November 7, 2006 (Doc. 1389-2)³.

Thus, if a service is required by an IEP, settlement agreement, HOD, or court order, the provider may include that service in an invoice. If the LEA wishes to dispute inclusion of a particular service in the student’s program, the LEA may challenge the disputed service by utilizing the due process procedures under IDEA. The LEA cannot place the student’s service or placement at risk by refusing payment. Petties, 298 F. Supp. 2d at 67.

IV. The Proposed Rates Are Insufficient for Providers to Continue to Provide Services.

A) A failure to make payment on time or in full is a change in placement.

Protecting the rights of Petties class members under the IDEA, 20 U.S.C. § 1411 *et seq.* means ensuring that the rates must be sufficient to allow providers to continue providing services. Federal law is clear that a failure to make payment or to *reduce* payment is tantamount to a change in placement. The Petties Court has made numerous rulings on this issue: “As the Court has concluded time and again, ‘failing to make payments in whole or in part or cutting off funds for special education programs amounts to a unilateral change in students’ placement, which is prohibited by the IDEA.’” Petties v. District of Columbia, 298 F. Supp. 2d 60, 67 (D.D.C. 2003)(quoting Petties v. District of Columbia, 881 F.Supp. 63, 66 (D.D.C. 1995)). See also Petties v. District of Columbia, 238 F.Supp.2d 88, 90 (D.D.C. 2002).

OSSE has stated that the proposed regulations will not change students’ placements. See OSSE Presentation “Nonpublic Rate-Setting Overview”, March 25, 2011, p. 3. To determine whether, in fact, that statement is true, Plaintiffs’ counsel has asked the District to provide the facts it relied upon in determining those rates, including any projections as to financial and programmatic impact the rates might have, and other alternatives considered. See Letter from Jennifer Lav, Plaintiffs’ Counsel, to Virginia Crisman et al., April 6, 2011.

³ See Order, November 7, 2006 (Doc. 1389-2)(approving the Special Master’s report and recommendations).

While we have not yet received complete information, there is reason to believe that some of the proposed rates may not be sufficient to maintain student services and placements, or to obtain appropriate independent evaluations. For example, there are several disputes pending before the Special Master in the Petties case between related services providers and DCPS and OSSE challenging the rates for related services and evaluations in Chancellor's Directive Blackman-Jones I. Alarming, many of the proposed new rates are substantially lower than the ones listed in the three-year-old Directive. Significantly, the 2008 Directive was adopted under the Blackman/Jones case in an attempt to attract competent evaluators to timely implement the requirements of hundreds of overdue HODs; if the rates are substantially lowered it seems likely that even fewer competent evaluators will be available and that more HODs and IEPs will go unimplemented, leading to more interruptions in services and litigation.

Several providers have testified both in writing and on the record at OSSE's recent public hearings that the proposed tuition rates, related services rates and evaluation rates are simply too low to continue to serve D.C. students. Below is a sampling of the providers' comments:

Uniform Tuition Rates

The CEO of High Roads testified that its operating costs in the District are significantly higher than in Maryland and the proposed rates are insufficient to serve D.C. students. For example, the salaries of High Roads teachers in D.C. are twenty-five percent higher than in Maryland.

The Director of the Accotink School testified that ninety-five percent of its operating costs go to personnel. Under the new proposed rates, he claims he will not be able to pay all of his staff.

Rates for Related Service and Independent Evaluations

Accotink testified the related services rates are well below a fair and competitive rate and that the school will not be able to serve the needs of its students.

Michelle Tiwiner of Pride Incorporated testified that there are two kinds of audiology evaluations, and the proposed regulations reduce the rate for the more complicated of the two. In response to OSSE's claim that it has actually increased audiology rates, Ms. Tiwiner explained that the proposed regulations would raise

the rates only for the more basic evaluation. A more time consuming and comprehensive evaluation would be much more expensive, but would be paid at the much lower rate.

Bruce Stein, a parent with a child at the Lab school, testified that his son currently receives integrated related services. The proposed regulations would cut the rates for individual psychotherapy by sixty-eight percent, group counseling by sixty percent, comprehensive evaluations by forty percent, speech and language therapy by thirty-one percent, and occupational therapy by thirty-seven percent.

Dr. Richard Fleitas suggested creating an independent panel to review the independent educational evaluations administered to D.C. children at OSSE's expense. Dr. Fleitas also testified that he would *not* be able to continue performing evaluations at the new rate

Kevin Parker from Parker Diagnostic Solutions noted that under the proposed rates evaluators would not be able to spend sufficient time to produce a quality evaluation that would be of use to an educational advocate. He also stated that he would not be able to employ licensed, highly qualified clinicians to perform evaluations or provide related services at the proposed rates. Like Dr. Fleitas, Dr. Parker testified that he would not be able to continue performing evaluations at the new rate. Dr. Parker presented information regarding rates across the country, indicating that OSSE's proposed rates were much lower.

Stephen Quinn, Psy.D, a licensed clinical psychologist, submitted comments and data stating the proposed rates for a comprehensive psychological evaluation were well below market rates in D.C.

Dr. Rhona Fields, the immediate past president of the D.C. Psychologists Association, testified that qualified psychologists would not work for the proposed rates and that the proposed ten hours for a comprehensive evaluation was much too low.

Dr. Iscoe, from the Kingsbury school, testified that while Kingsbury's rates for independent evaluations are already lower than most of their competitors, the proposed rate would cut the school's rate by forty percent. Moreover, ten hours is not sufficient for an independent comprehensive psychological evaluation. At these rates, she stated, Kingsbury could not continue to serve OSSE students.

Molly Whalen, the chairperson of the State Advisory Panel on Special Education, objected to the proposed evaluation rates as unrealistically low.

B) Setting a uniform tuition rate may be inappropriate because it may not adequately address the individualized needs of children.

The IDEA requires that services for students with disabilities be individualized according to each student's needs. See 20 U.S.C. § 1414(d)(1) (defining "individualized education program" to include assessment and specialized services to meet the educational needs of each individual child). Setting a standard or uniform rate for basic tuition is unlikely to adequately meet the needs of each individual child. Rates should be set according to the needs of the child at the beginning of the school year. It may be more appropriate to determine a series of rates depending on the type of program or the severity of the students' needs.

As stated above, these are preliminary comments, and will be amended if necessary based on the District's response to our outstanding FOIA request and motions to compel. However, at this juncture it appears that different providers have different expenses based on the kinds of programs they offer to meet the needs of their students. The UPSFF, by definition, cannot encompass the varied expenses based on overhead, variations in class size, the number and type of specialized practitioners needed to work with more challenging students, and the creation of special programs to meet students' differing needs.

C) The proposed regulations fail to adequately consider rates charged in other jurisdictions.

Class counsel objects to the permissive language of § 2849.3 which states that "OSSE *may* accept a rate set by a state or political subdivision within the state other than the state in which the school or program is located that is higher than the Maximum Per Diem Rate as calculated in this chapter, if the higher rate is due to the bundling of related services as permitted by that state." While the concept behind this regulation is a positive step toward accepting rates of other states, the word "may" should be changed to "shall".

Moreover, despite the fact that the cover letters and power points issued by OSSE state that it will accept rates approved by the Maryland State Department of Education for this upcoming school year, the regulation does not explicitly state so. It should be revised accordingly. We propose rewording § 2849.2 as follows:

OSSE shall accept the educational per diem rate set by the state or political subdivision within the state in which the school or program is located when the per diem rate is derived from a standardized rate-setting methodology deemed reasonable by OSSE. *OSSE has determined that Maryland rates set by MSDE are reasonable* (suggested language is in italics).

Finally, Maryland state law prohibits providers in other jurisdictions from charging higher rates to Maryland than they do in other jurisdictions. If OSSE's proposed rates for serving D.C. students in D.C. are lower than Maryland rates for comparable students, the Maryland providers may simply have to refuse to serve D.C. students.

V. The Proposed Attendance Regulations Violate IDEA and Petties.

Under proposed regulation § 2821.13, OSSE will cease payment to a nonpublic school or provider after a student has fifteen consecutive unexcused absences. Furthermore, if the student has accrued an extended period of excused absences, a nonpublic school or program may not charge fees for more than fourteen school days.

We have a general objection to this section which ties student attendance to payments. We commend OSSE's efforts to encourage student attendance and to encourage, indeed require, the non-public schools to take all reasonable steps to ensure student attendance. However, the law has been well established in this case that denying payment to a provider due to a student's absence is tantamount to a change in placement if there has not been an authorized change in the student's placement through an IEP meeting. See Petties v. District of Columbia, 881 F. Supp. 63, 64 (D.D.C. 1995). The regulations correctly require that steps be taken by the LEA to hold an IEP meeting when a student has repeated unexcused absences. D.C. Mun Regs., tit. 5-A §2821.4(b)(2011). However, until the student's placement has been legally changed from the current non-public school to another school or program, the provider must be paid for its ongoing expenses so it can maintain services in the event the student returns to class.

Class counsel further suggests adding the following conditions under which OSSE will continue to pay a nonpublic school to maintain a children's placement under § 2821.14; *situations when a child must frequently change his or her address, such as when a child is homeless or in foster care.*

VI. Conclusion

Thank you again for the opportunity to comment on the proposed regulations. We look forward to further discussing our comments and the rate setting process, and providing more detailed and comprehensive analysis when we receive the information we have requested from OSSE and DCPS regarding rate-setting.

Sincerely,



Dari Pogach
Steven Ney
Jennifer Lav
University Legal Services

Bradford Johnson
Johnson Law Group International, PLLC

Counsel for Petties Class